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Supreme Court of the United States

OCTOBER TERM, ~~1962.~~ 63

No. [redacted] 11

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 164.

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE APPELLANT.

Opinions Below.

The appellant was charged with possessing an obscene film, "The Lovers", and with exhibiting the film at the Heights Art Theatre in the City of Cleveland Heights. He was tried by three Judges in the Court of Common Pleas of Cuyahoga County, Ohio and was found guilty of both charges on June 8, 1960. The opinion is not reported but is printed at R. 500-1.

The judgment of conviction was affirmed June 21, 1961 in the Court of Appeals for Cuyahoga County and the opinion is reported at 175 N. E. 2d 123 (R. 501-506).

The judgment of the Court of Appeals was affirmed by the Supreme Court of Ohio on January 17, 1962. The opinion is reported at 173 Ohio St. 22 and 179 N. E. 2d 77 (R. 510-520).

Statement of the Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257 (2).

The decree sought to be reviewed was entered by the Supreme Court of the State of Ohio on January 17, 1962. The Notice of Appeal to the Supreme Court of the United States was filed April 12, 1962 in the Supreme Court of the State of Ohio, and in the Court of Appeals in Cuyahoga County, State of Ohio, and in the Court of Common Pleas, County of Cuyahoga, State of Ohio.

Probable jurisdiction was noted October 8, 1962 (R. 524).

The Constitutional Provisions and Statutes Involved

The Constitution of the United States,

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Statutes Involved

Ohio Revised Code Section 2905.34. "*Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes:*

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

(Page's Ohio Revised Code Annotated, Title 29, 1962 Supplement, at p. 8, 9.)

The texts of Ohio Statutes modifying or affecting §2905.34 that are referred to in the brief, are set forth in the Appendix.

The Questions Presented for Review

(1) Whether Section 2905.34 of the Ohio Revised Code abridges the freedom of the press, in violation of the First and Fourteenth Amendments in punishing the private possession of obscene material, and in punishing one who, without guilty knowledge or wrongful intent, exhibits obscene material.

(2) Whether Appellant was denied due process by the Ohio Supreme Court's adoption, on the appeal from Appellant's conviction, of an interpretation of the statute governing the offenses, in conflict with an earlier interpretation given by the same Court, the prior construction having been followed by the Court in which Appellant was convicted.

(3) Whether Section 2905.34 of the Ohio Revised Code is void in its entirety because it contravenes the First and Fourteenth Amendments in the majority of its intended applications, and is so vague and indefinite that it permits arbitrary and discriminatory enforcement and fails to forewarn those subject to the law of the conduct it prohibits.

(4) Whether the trial court in convicting Appellant, and the Court below in affirming his conviction of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those prescribed by this Court, and punished Appellant for dealing with a film within the protection of the First and Fourteenth Amendments of the Constitution.

(5) Whether Section 2905.34 of the Ohio Revised Code infringes the right of communication protected by the First and Fourteenth Amendments, and is void for vagueness under the Due Process Clause of the Fourteenth Amendment in making it a felony to possess or exhibit an "obscene" motion picture.

Summary of Argument

I. Section 2905.34 of the Ohio Revised Code prohibits the exhibition and the possession of obscene books and films. Appellant was tried and convicted of violating the statute. At the time of his trial the statute, as construed by the Ohio Supreme Court, punished mere possession of an obscene book or film (so long as the person in possession had knowledge of the content) and punished the sale or exhibition of such material though the book-seller or exhibitor was innocent of any culpable intent or purpose. The statute as it was then interpreted and applied is repugnant to the constitutional right of free press, for in punishing innocent conduct it discourages acquisition and dealing in books and motion pictures.

After the Appellant was convicted, the Ohio Supreme Court in its opinion affirming Appellant's conviction, adopted a construction of the statute in direct conflict with its earlier interpretation. The change in the meaning of the statute was given retroactive effect. As a result Appellant was deprived of rights without due process of law for Appellant was denied the opportunity to prepare his defense against the charge of offending the statute as revised, and he was denied the right, on appeal, to have the validity of his conviction appraised on the consideration of the case as it was tried.

II. Section 2905.34 of the Ohio Revised Code is unconstitutional in the majority of its intended applications; it also has an inhibitory effect on expression, and for those reasons should be held unconstitutional in its entirety. The section prohibits the sale of books "not wholly obscene" in violation of the constitutional requirement that a book be judged by the dominant effect of the work as a whole. The statute is unconstitutionally vague in that it prohibits and punishes the loan, gift or sale of "immoral" or "indecent" drawings, representations and articles. The statute is unreasonable in prohibiting such conduct as giving or showing police reports or accounts of criminal deeds (including accounts intended to inculcate moral principles), to a minor. The statute is unconstitutional in that it makes it a criminal offense punishable by 7 years imprisonment to keep in view, on any newsstand that minors may pass, newspapers or books devoted to news or stories of crimes, or to accounts of immoral deeds.

III. Appellant was convicted and fined for exhibiting the film "The Lovers." The film is not obscene and the conviction of Appellant was therefore in contravention of rights guaranteed by the First and Fourteenth Amendments. The film was not judged by the Ohio Courts in accordance with constitutional standards. It was judged by the effect of an isolated sequence, and in accordance with the supposed standards of the people of Cuyahoga County. The requirement that those who deal with periodicals, books or films, conform to the differing standards of each town, township and rural area imposes an insupportable burden on publishers, producers and distributors of books, films and magazines, and abridges the freedom of the press. The Ohio Courts in holding "The Lovers" obscene also erred in failing to take into consideration its redeeming social value.

IV. A statute punishing the sale of obscene material violates the First Amendment right of communication and is void for vagueness, for the word obscene is not capable of reasonably precise or clear definition.

Statement of the Case

This appeal is from a judgment of the Supreme Court of the State of Ohio affirming Appellant's conviction of the crimes of possessing an obscene film entitled "The Lovers" (Pl: Ex. 1-A and 1-B; R. 27,100) and of exhibiting the film at the Heights Art Theatre in the City of Cleveland Heights, Ohio (R. 509). Appellant was fined $500 on the first count and $2,000 on the second count, and was committed to the Workhouse until both fines, and the costs of the prosecution, were paid (R. 7-8). Execution of the sentence was stayed pending appeal (R. 8).

At the time of the indictments the Appellant Jacobellis was the manager of the Heights Art Theater (R. 465), one of a chain of fifteen theaters (R. 324). All films shown at the Heights Art Theater were selected by the two owners of the company that operated the chain. One of the owners of the company lived and worked in Ohio (R. 324-5). The Heights Art Theatre catered to adult audiences and the films exhibited there were of high quality (R. 467-8).

Appellant's duties as manager of the theater were to screen films for critics (R. 466), arrange for the placement of advertisements prepared for him (R. 478), and to supervise operating personnel (R. 466). Appellant did not take any part in selecting films or in deciding when they were to be shown (R. 466). He had no authority to make any cuts or changes in the pictures and he testified that he would have been discharged if he refused to show a film chosen for the theater (R. 466).

The film found obscene in the Courts below is entitled "The Lovers". It was produced in France and is based on a popular 19th century French novel "Point de Lendemain" (Dft. Ex. I; R. 493, 1332). The principal character in the film is portrayed by Jeanne Moreau, one of France's leading actresses (R. 363). The director of the film, Louis Malle has an established reputation in his country and received an award in the United States from the Academy of Motion Picture Arts and Sciences (popularly known as an "Oscar") (R. 363).

The story of the film is about a sophisticated, superficial, woman who sacrifices husband, child, home, comfort, security and social position for an uncertain life with a young archaeologist with whom she has, quite suddenly, fallen completely in love.

There is an intense, love scene between the woman and the archaeologist in the last reel of the film. The State's objections to the film are based almost entirely, on that scene. Film critics and an expert called as witnesses by the defense expressed the view that the sequence was beautifully acted and filmed, and that it was necessary to make the woman's transformation and conduct appear credible (R. 461-2; Deft. Ex. I; R. 492, 1332; Dft. Ex. H-1; R. 490, 1331). Hollis Alpert, film critic of The Saturday Review of Literature made the following comment on the scene: "I was reminded of a story by de Maupassant called "Moonlight," in which a priest watches a girl and a boy commit what in his eyes must be an act of sin, and yet he does not disturb them, but walks away with the sense that he has, after all, seen the inscrutable workings of God" (Dft. Ex. I; R. 491, 1331).

"The Lovers" received the second prize at the International Film Festival in Venice (R. 359) and was voted one of the best films of the year 1959 by Hollis Alpert, Arthur

Knight, also of the Saturday Review of Literature, and by Bosley Crowther, film critic of the New York Times (R. 176, 403).

When "The Lovers" was brought to the United States it was examined by Customs authorities in New York and in Washington, and the Bureau of Customs judged the film to be "not obscene" (Dft. Ex. K; R. 496, 1334). The film was shown in approximately 100 of the larger cities in the United States including Washington, D. C., Boston, New York, Providence, Hartford, Detroit, and San Francisco (R. 361).* Before it was sent to Jacobellis for exhibition at the Heights Art Theater, it was also shown in Columbus and Toledo, Ohio (R. 326-7, 330).

The film was reviewed by film critics in the United States as a production worthy of serious consideration. The tenor of some of the favorable reviews has been indicated. Some of the critics damned the picture. Ward Marsh, film critic of the Cleveland Plain Dealer, and a witness for the prosecution thought the sequence referred to was filthy, and the remainder of the film, dull (R. 149, 121). Henry Hart, editor of "Films in Review," (also a witness for the State) was of the same opinion (R. 215).

The Court below described "The Lovers" as "87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity." (*State* v. *Jacobellis*, R. 517) 173 Ohio St. at p. 28. The statement that there was a "*showing* of an act of perverted obscenity" was not intended literally. During the scene in question the camera is focused on the shoulders, face and hand of

* Deletions of 131 feet (about half a minute) were made in the film licensed and shown in New York and Boston (R. 378) but the witnesses who saw the New York and the Ohio versions were unable to perceive any difference between them (R. 302-3, 440-1).

the principal character. The witnesses for the prosecution testified that they *"inferred"* or *"imagined"* that an unnatural sexual act was being performed "off the screen" (R. 123, 134, 161). Apparently the Ohio Supreme Court reached the same conclusion. One of the State's witnesses who imagined that an act of perversion was performed out of the camera's range, also testified that a map shown at the beginning of the film was suggestive to him, of sexual intercourse (R. 203).

It is not claimed that the Appellant Jacobellis believed "The Lovers" was pornographic, or that his presentation of it was clandestine, or that his conduct in any way evidenced an illicit purpose. When the film was received from his employer he placed an advertisement in the local paper (R. 43) and arranged a pre-view for film critics, (R. 467) with the understanding, of course, that their reviews would be published when the film was shown.

The police of Cleveland Heights learned that "The Lovers" was to be shown as a result of an advertisement in the Cleveland Plain Dealer (R. 43). Captain Gordon, chief of the Cleveland Heights police, called Jacobellis a few hours before the first showing. In answer to the Captain's inquiry with respect to the nature of the picture, Jacobellis spoke of it as "beautifully done" in "good taste" and invited the police chief to the opening (R. 44).

The police chief accepted the invitation and was present at the first showing of the film in the Heights Art Theatre on November 12, 1959 (R. 45). He did not then advise Jacobellis that he found "The Lovers" objectionable and did not suggest that the film be withdrawn (R. 473). Captain Gordon returned to the theater on November 13th, 1959 with some other County officials, and after seeing the

picture again (R. 47) seized the film, and arrested Jacobellis (R. 475-6).

Two indictments were thereafter handed down against Jacobellis. One accused him of possessing on November 13, 1959 "a certain obscene, lewd and lascivious motion picture film, to-wit: (Les Amants) "The Lovers," and the other charged him with exhibiting the picture on the same day (R. 1, 9, 10). Jacobellis was tried by 3 Judges in the Court of Common Pleas of Cuyahoga County, Ohio, and was found guilty of both charges on June 8, 1960 (R. 7). The judgment of conviction was affirmed June 21, 1961 in the Court of Appeals for Cuyahoga County (175 N. E. 2d 123, R. 506), and the judgment of the Court of Appeals was affirmed by the Supreme Court of the State of Ohio January 17, 1962 (173 Ohio St. 22, 179 N. E. 2d 77, R. 509).

POINT I.

Section 2905.34 of the Ohio Revised Code, as interpreted when appellant was tried, violated the constitutional guarantees of freedom of communication. The affirmance of appellant's conviction under a different and conflicting interpretation of the statute was a denial of due process.

Jacobellis was charged, tried and convicted under the first clause of Section 2905.34, of the crimes of possessing and of exhibiting an allegedly obscene film. On March 23, 1960, a few days before Jacobellis' trial began, the Ohio Supreme Court published its opinion in *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387, in which it held that knowledge of the circumstances, in that case knowledge of the content of the material (i.e. *scienter*) *was* required in a prosecution under §2905.34; but that awareness of wrong-

doing (i.e. culpable intent or purpose) *was not*, a constituent element of the crimes outlined in the statute. The Court held in *Mapp* that all that the statute required was a showing of knowledge of the facts, and it did not require proof of criminal purpose or knowledge that the conduct violated the law.

In the *Mapp* case the defendant was charged with knowing possession of obscene books and other material. The defendant Mapp claimed that the books had been left by a tenant, and that after discovering and examining them she put them away to await the owner's return. The Ohio Supreme Court ruled in sustaining the defendant's conviction in *State* v. *Mapp, supra*, that Section 2905.34 forbade even innocent possession, and that one could be sentenced as a felon under the statute for merely having a book though he acquired it without knowledge of its character, and after examining it and discovering it to be obscene, determined never to look at it again. 170 Ohio St. 433, 166 N. E. at 390. "If anyone looks at a book and finds it lewd" Judge Taft said for the Court in *State* v. *Mapp*, "he is forthwith under this legislation guilty of a serious crime" (170 Ohio St. at 433, 166 N. E. at 391).

The legislative history of the section allowed no other interpretation than that given by the Ohio Court in *Mapp*. An earlier version of the statute provided that knowing possession of obscene books etc. was punishable provided such possession was for the purpose of later distribution. That proviso was eliminated in the 1939 amendment of the statute and was never restored. *State* v. *Mapp*, 170 Ohio State at 427, 166 N. E. 2d at 392.*

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* Although *State* v. *Mapp* dealt only with the charge of possessing obscene matter, it is clear that the finding that one may be guilty of that crime under Section 2905.34 without culpable intent, would also apply to the statutory prohibition against sale, gift or exhibition of obscene matter. Section 2905.34 provides "No person shall

The construction of Section 2905.34 in *State* v. *Mapp*, 170 Ohio St. 427 became the definitive interpretation of the statute and was binding on all law enforcement agencies in Ohio. (*Mapp* v. *Ohio*, 367 U. S. 643 at 675, dissenting opinion of Mr. Justice Harlan). The statute had previously been given the same construction in *State* v. *Cowan* (1958), 7 Ohio Ops. 2d 81, in which the following rationale of the legislation was given:

> "a narcotic physically poisons the mind and body and is injurious to both moral qualities and physical structures . . . so too, does admittedly obscene material mentally poison the mind . . ."
>
> "* * * The claim that possession in and of itself cannot be wrong is overcome for the same reasons as have been applied above." (7 Ohio Ops. 2d 81-82)*

---

knowingly sell, lend, give away, exhibit . . . or have in his possession or under his control an obscene etc.". The term "knowingly" qualifies the verbs "sell", "lend", "giveaway" and "exhibit" and was held in *Mapp* to apply also to the phrase "or have in his possession". It obviously cannot have one connotation (i.e. *scienter*) when applied to "possession" and another (*scienter* and *criminal purpose*) when applied to the words "lend", "give away" and "exhibit". It would be manifestly absurd to hold that the statute punishes innocent possession but does not punish sale or exhibition unless it is with intent to violate the law.

* Mr. Justice Brennan made the following answer to the argument from a similar analogy in Smith *v.* California (1959) 361 U. S. 147, 152-3: "The appellee and the court below analogize this strict liability penal ordinance to familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged, food and drug legislation being a principal example. We find the analogy instructive in our examination of the question before us. The usual rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors—in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used. . . . There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the book seller."

In the instant case the Appellant Jacobellis filed a demurrer to the indictment in the Ohio Court of Common Pleas, in part on the ground that Section 2905.34 is unconstitutional because of its failure to require the showing of criminal intent. The Court made the following ruling (R. 12):

> "This trial Court unanimously agrees that it is bound by the case of the State of Ohio *vs.* Dollree Mapp, 170—O. S.—427, and by the appellate decision therein, in which the constitutionality of Revised Code 2905.34 is upheld; and, therefore, this Court is overruling the demurrer herein, to which defendant may save his exception."

As the Judges who tried Jacobellis held, they were bound by the construction of Ohio Revised Code Section 2905.34 given in *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387 (R. 12), and Jacobellis' conviction by the Court of Common Pleas on June 8, 1960 was based on that interpretation of the statute.

An appeal from the judgment of the Ohio Supreme Court in *State* v. *Mapp, supra*, was taken to this Court, and it was pending at the time Jacobellis was tried. The *Mapp* appeal was determined June 19, 1960, eleven days after Jacobellis was convicted. This Court reversed the judgment of the Ohio Court in *State* v. *Mapp* because the conviction had been obtained by the use upon her trial, of evidence seized during an unlawful search of the Appellant *Mapp's* home. Justices Harlan and Stewart indicated in their opinions in *Mapp* v. *Ohio*, 367 U. S. 676, 686 that the appeal should have been decided on the question of the validity of Ohio's Section 2905.34 "which as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of

such possession or control . . . and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene, . . ." *Mapp* v. *Ohio*, 367 U. S. 643, 676-677. Mr. Justice Stewart wrote, in his opinion in *Mapp* v. *Ohio* (367 U. S. at 686):

> "I would, however, reverse the judgment in this case, because I am persuaded that the provision of §2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice Harlan, *not* "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment" (emphasis ours).

Jacobellis' appeal to the Ohio Supreme Court from the judgment convicting him, was heard *after* the opinions of this Court in *Mapp* v. *Ohio* were announced. Forewarned, by the opinion of Mr. Justice Stewart, that this Court might strike down §2905.34 as interpreted in *State* v. *Mapp*, the Ohio Supreme Court, in affirming Jacobellis' conviction, adopted a contrary construction and held that the statute required a showing of guilty knowledge and purpose as essential elements of the crime. *State* v. *Jacobellis* (R. 514) 173 Ohio St. at 27.

"In the phrase, "knowingly possess,", Judge Radcliffe wrote for the Ohio Supreme Court in this case, "as used in criminal statutes, is implicit not only the element of *scienter* but also the element of *mens rea*, namely, a guilty wrongful purpose. *It is not conceivable to us that a violation of Section 2905.34 is committed the moment an individual discovers that a book, picture or film in his possession is pornographic.*" (emphasis ours) *State* v. *Jacobellis* (R. 514, 173 Ohio St. at 27).

While solemnly proclaiming its "high regard for the doctrine of *stare decis*" in its opinion in this case, (R. 518) 173

Ohio St. at p. 28 the Ohio Supreme Court abrogated its determination, made 20 months before, without a single dissent on that question. One reading only the majority opinion in *State* v. *Jacobellis* would be led to believe that the Ohio Supreme Court never held a different view, and that there had never been any other authoritative interpretation of §2905.34. There isn't a reference in the majority opinion in *State* v. *Jacobellis* either to the decision in *State* v. *Mapp* or to Mr. Justice Harlan's exposition, in *Mapp* v. *Ohio*, 367 U. S. at 675, of the statute as originally construed, though it would be difficult to conceive of interpretations more at variance.*

The validity of the statute must be determined as it was construed when the Appellant was tried and punished for its violation, *Cole* v. *Arkansas* (1948), 333 U. S. 196; *Jones* v. *Opelelka*, 316 U. S. 584, 603, dissenting opinion, followed on rehearing (1943) 319 U. S. 103. As it was interpreted in *State* v. *Mapp*, 170 Ohio St. 427, and by the Trial Judges

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* Judge Taft: (*State* v. *Mapp* 170 Ohio St. at 433) "if anyone looks at a book and finds it lewd he is forthwith under this legislation (Section 2905.34) guilty of a serious crime." (matter in parenthesis ours).

Mr. Justice Harlan: (dissent in *Mapp* v. *Ohio* 367 U. S. at p. 675) "The Ohio statute (§2905.34) which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control . . . and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene . . . (matter in parenthesis ours).

Judge Radcliffe: (*Jacobellis* v. *State* (R. 516, 173 Ohio St. 27). "It is not conceivable to us that a violation of Section 2905.34 is committed the moment an individual discovers that a book, picture or film in his possession is pornographic. He could only be said to violate the law when and if he . . . forms the mens rea and acts in furtherance thereof.".

"Statutes sometimes receive heroic treatment at the hands of courts in construing them so as to sustain their constitutionality" Judge Van Voorhis wrote in dissent in *People* v. *Finkelstein*, (1961) 9 N. Y. 2d 342, 347, "but" he added "that is a practice which is necessarily more limited in criminal than in civil actions where the effect is to redefine the nature of a crime ex post facto."

who tried and convicted Jacobellis (R. 12), Section 2905.34 was unconstitutional. The Ohio Supreme Court deprived Jacobellis of due process in attempting to validate his conviction under a void statute by changing the meaning of the statute on the appeal from his conviction.

We shall consider first the unconstitutionality of Section 2905.34 of the Ohio Revised Code as interpreted when Jacobellis was convicted, and then the denial of due process by the attempt to change the interpretation of the statute on the appeal from his conviction.

Section 2905.34 of the Ohio Revised Code was unconstitutional as construed when Jacobellis was found guilty of its violation

There can be little doubt that Section 2905.34 as construed in *State* v. *Mapp*, and as applied by the Trial Court in this case, is unconstitutional. Even the majority of the Ohio Supreme Court in *State* v. *Mapp* were of the opinion that Section 2905.34 infringed the constitutional right of free press because it would "discourage law abiding people from even looking at books and pictures" 170 Ohio St. at 432, 166 N. E. 2d 391. Judge Herbert, in a separate opinion in *State* v. *Mapp* wrote: "to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual." (170 Ohio St. at p. 437, 166 N. E. 2d at 393).

Section 2905.34, was not declared invalid by the Ohio Supreme Court in *State* v. *Mapp* because the Ohio Constitution requires a concurrence, in such case, of six of the seven Judges of the Ohio Supreme Court in the finding of unconstitutionality, and only four of the Judges joined in that opinion, 170 Ohio St. at p. 434, 166 N. E. 2d at 391; *Mapp* v. *Ohio*, 367 U. S. 643 at p. 673 fn. 3.

In *Smith* v. *California*, (1959) 361 U. S. 147 the Court struck down an ordinance making the offering of obscene books a penal offense even though the bookseller may not have been aware of the content of the material offered. The ordinance involved in *Smith* completely eliminated the requirement of *scienter* and imposed a strict criminal liability on any store owner possessed of an obscene book whether or not he had seen the book, or knew what it contained. Such ordinance, the Court held, tends to restrict the sale and distribution of constitutionally protected expression by making it necessary for booksellers to read all books received for sale, in order to avoid criminal liability, 361 U. S. at p. 153.

The Court did not find it necessary in *Smith* v. *California*, *supra*, to determine whether a statute punishing the holding or offering of obscene material for sale, meets constitutional requirements if it dispenses with the requirement of culpable intent and with the requirement of knowledge or reason to believe that the material is in fact obscene. Mr. Justice Brennan wrote for the Court: "We need not and definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; *whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse;* whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be" (361 U. S. at p. 154, emphasis ours).

The Court's reasons for condemning the ordinance involved in *Smith* v. *California* 1959 (361 U. S. 147) how-

ever, apply with equal force to the statute here challenged. In the *Smith* case the Court said, 361 U. S. at p. 152:

> "The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if in fact there is to be found in his shop an obscene book. But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold."

A statute prohibiting possession or exhibition of obscene matter, that fails to require proof of culpable intent, also imposes an excessive burden on those who deal with books, periodicals and films by compelling them to do so at their peril, and thus inhibits the flow of communication. This Court has for that reason, consistently condemned laws punishing expression where "drawn without regard to the presence or absence of guilty knowledge", *Sweezy* v. *New Hampshire*, (1957) 354 U. S. 234, 248; *Herndon* v. *Lowry* (1937), 301 U. S. 242, 259; *Winters* v. *New York*, (1948) 333 U. S. 507, 519; *Weiman* v. *Updegraff*, (1952) 344 U. S. 183, 191; *Speiser* v. *Randall*, (1958) 357 U. S. 513, *Staub* v. *Baxley*, (1957) 355 U. S. 313, 325.*

The statute here challenged is an example of the inhibiting effect of a law proscribing obscene publications, which does not require the showing of unlawful intent. In *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387, Judge Taft wrote for the Ohio Supreme Court, referring to Section 2905.34 as it was then construed (and as it was construed

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* We are not in this discussion, considering the injustice of punishing one who is morally innocent.

by the Trial Court in this case) (170 Ohio St. 431, 166 N. E. 2d 391):

> "It may be argued that the legislation involved in the instant case, unlike that in the *Smith* case, requires *scienter* because it only makes it unlawful to "*knowingly* . . . have . . . possession". However, this legislation is analogous in its effect to that in the *Smith* case. If anyone looks at a book and finds it lewd, he is forthwith under this legislation, guilty of a serious crime, which may involve a sentence to the penitentiary similar to the one given to this defendant. As a result someone who might otherwise read books that are not obscene may well be discouraged from doing so, and their free circulation and use will be impeded."

See also Mr. Justice Stewart's concurring opinion in *Mapp* v. *Ohio*, 367 U. S. at 686, quoted at p. 15 of this brief.

Mr. Justice Harlan remarked, in his opinion in *Roth* v. *United States*, that obscenity is not "a particular genus of 'speech and press' which is as distinct, recognizable and classifiable as poison ivy among plants, . . . the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind" 354 U. S. at p. 497. Courts have frequently differed in determining whether a particular work is obscene. If men learned in the law may be mistaken in judging whether material is obscene, it is unjust to imprison a dealer in books for falling into a like error in making that difficult judgment. The punishment of such honest mistake will inevitably act as a restraint upon the exercise of the constitutional right of communication. Requiring proof of the mental element of wrongful purpose does not, as Mr. Justice Brennan indicated in *Smith*, present any counterbalancing problem, or

impose a burden in enforcing the law, that would justify the restraint upon the press, 361 U. S. at 154.

There are, as Mr. Justice Harlan noted, acknowledged masterpieces in the fields of literature, science and art that may be said "to appeal to the prurient interest of the reader or observer", *Manuel Enterprises v. Day* (1962) 370 U. S. at p. 487. Knowing that an error in judgment will be punished as a crime a bookseller or art dealer will be moved by prudence to reject works that in his opinion are of enduring value, if he has reason to believe that local government officials will disagree with his judgment.

In this case Jacobellis exhibited the film at the direction of his employer (R. 466). He believed that the film was beautifully made (R. 44) and was so certain that it was free of obscenity, that he invited the local police chief to attend the first showing of the film (R. 44). Jacobellis' views were sustained by the finding of a federal government agency (Dft. Ex. K; R. 496, 1334) and the published views of eminently qualified film critics (R. 469; 470). If Jacobellis' conviction is sustained, those who deal in books, films, plays and periodicals may be well advised wherever there is the slightest doubt, to refuse to proceed without the imprimatur of the local police.*

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* We have no reason to rely on the judgments of policemen and government prosecutors. They have not shown great wisdom in their appraisals of serious writing and artistic endeavor. In recent years the works of Eugene O'Neil, Ernest Hemingway, William Faulkner and John Steinbeck (to name only American authors awarded the Nobel prize for literature) have been banned as obscene. Pearl Buck appears to be the only American Nobel laureate in literature whose writing has not been found obscene. In January 1963 the State of Kansas found an otherwise unexceptionable film (and an excellent one) obscene because of the use of the word "slut" in the dialogue. Not many years ago, the Cleveland police objected to the sale of Freud's General Introduction to Psychoanalysis because of its emphasis on sex. The First Freedom, p. 181, The American Library Association.

The Appellant Jacobellis was denied due process by the Ohio Supreme Court's decision retroactively changing the meaning of the statute he was convicted of violating.

The opinion of Mr. Justice Stewart in *Mapp* v. *Ohio*, 367 U. S. 643, 686 was taken as an indication that this Court would in a later case hold Section 2905.34 unconstitutional as it was construed in *State* v. *Mapp, supra.* The Ohio Supreme Court, to avoid such determination in this case, adopted a construction contrary to that upon which the case was tried. It was assumed that this Court would, under the familiar rule, accept and follow the most recent construction of a State statute by the highest court of the State. Cf. *Douglas* v. *Pike* (1880), 101 U. S. 677, 686. Judge Taft, in his dissent in the Court below, intimated that the changed interpretation of the statute would be helpful in avoiding a review by this Court (R. 519, 520, 173 Ohio St. at p. 30). Whether or not the Ohio Court could save the statute by modifying its earlier reading, the affirming of Jacobellis' conviction under a different law than the one he was convicted of violating, was clearly a denial of due process.

In *Cole* v. *Arkansas* (1948), 333 U. S. 196, the Court reversed a conviction on the ground that the Appellant had been charged under one section of a statute and his conviction was affirmed by the highest Court of the state under a different section. The rule of *Cole* v. *Arkansas, supra*, is applicable here for the Appellant Jacobellis was convicted under a statute that omitted the element of culpable intent and his conviction was affirmed under a statute that the Ohio Supreme Court said required such intent.

In its opinion in this case, the Ohio Supreme Court in answering one of the Appellant's contentions, made a comparison between Sections 2905.34 and 2905.342 of the Ohio Revised Code, both of which punish possession and exhibition of an obscene motion picture. The Court found that the

two statutes were totally different and involved "no common principle of law" because the latter section omitted the element of *scienter*, while the former required it to be shown as an element of the crime *State* v. *Jacobellis* (R. 518, 173 Ohio St. at p. 28). For the same reasons, the absence of the requirement of culpable intent in the statute under which Jacobellis was tried, made it a different statute from the one under which his conviction was sustained.

The judges of the County Court who tried Jacobellis acknowledged that they were bound by the law as it was set forth in *State* v. *Mapp* (R. 12). They found him guilty, in the belief that no proof of guilty knowledge was required, and obviously without proper consideration of the proof submitted on, or the question of the burden of proving, that issue. See *Speiser* v. *Randall*, (1958) 357 U. S. 513. The attempted change in the meaning of Section 2905.34 by the Ohio Supreme Court in *State* v. *Jacobellis, supra*, could not retroactively affect the Trial Court's contrary understanding of the law.

Jacobellis was tried and defended his case on the theory that culpable intent was not an essential element of the crime, or a necessary part of the prosecution's case, or that the absence of such intent might constitute a defense. He was thus in effect denied the right to submit evidence in his defense on an issue that became a vital issue in the case after his conviction. A penal statute must state precisely what conduct is prohibited so that a person may know in advance what actions are proscribed and what defense may be interposed. *Lanzetta* v. *New Jersey*, (1939) 306 U. S. 451, 453. One charged with offending against a penal statute cannot be compelled to assume the burden of a change in the meaning of the law by subsequent construction. *Connally* v. *General Construction Co.*, (1926) 269 U. S. 385, 391, 392-393, 395; *Thomas* v. *Collins*, (1945)

323 U. S. 516, 535. A retroactive change in the definition of a statutory crime after one has been convicted of committing it, denies both the opportunity to avoid offending the law, and the opportunity to prepare the defense against the charge of violating it.

Due process was also denied the Appellant Jacobellis in connection with his appeal to the Ohio Supreme Court. The appeal proceeding, being available to all in similar circumstances, was as much a part of the process of law, to which Jacobellis was entitled, as any other. *Frank* v. *Magnum*, (1915) 237 U. S. 309, 327. The Ohio Supreme Court by adding a new element to Revised Code Section 2905.34 after Jacobellis' trial, denied him the right of a hearing on appeal with respect to the constitutionality of the statute as it was applied in his case. As Mr. Justice Black said in discussing that point in *Cole* v. *Arkansas*, (1948) 333 U. S. 196, 202: "To conform to due process of law petitioners were entitled (on the appeal) to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court" (matter in parentheses ours).

Section 2905.34 as interpreted at the time Jacobellis was convicted was, as we have seen, unconstitutional. An unconstitutional statute is ". . . as inoperative as though it had never been passed". *Norton* v. *Shelby County*, (1886) 118 U. S. 425, 442. Since Appellant's conviction was not under law, it could not be validated by a changed concept of the statute on appeal.

There have been other cases in which State Courts reversed their earlier view of the validity or interpretation of a statute. It has been the general rule in such cases to give the overruling decision only prospective effect if to give it retroactive effect would be to the detriment of an

accused. In *State* v. *Longino*, (1915) 109 Miss. 125, 67 So. 902, the Court said (109 Miss. pp. 133-134):

> "We think that a change of decisions involving the interpretation of criminal statutes should have a prospective effect. The rule seems to be the just and the reasonable rule. This rule applies the same principle as the constitutional prohibition of ex post facto legislation. It will prevent injustice . . .".

In *State* v. *Bell*, (1904) 136 N. C. 674, 49 S. E. 163, the Court found, contrary to an earlier decision, that a Defendant-appellant's conduct was within the purview of a criminal statute. The Court held, however, that the new construction put upon the statute would apply only to future cases, and said, in reversing the Defendant's conviction (136 N. C. pp. 676-677):

> "We are embarrassed in applying this ruling to this case. It may be that these defendants have acted upon the advice of counsel based upon the decision of this court. So, to try them by the law as herein announced would be an injustice."

Again, in *State* v. *O'Neil*, (1910) 147 Iowa 513, 126 N. W. 454, a statute that had previously been held unconstitutional by the Court, was sustained as vaild. The appellant's conviction under the statute was, however, reversed, for as the Court said (147 Iowa p. 521):

> "To the ordinary mind it would smack of absurdity to say that the defendant ought to have known that the statute was constitutional . . . although the Supreme Court of the State . . . had unanimously held that it was . . . invalid. Under such circumstances it is plain that there should be some relief to Defendant from punishment, for the very purpose of punishment is defeated if unreasonably and arbitrarily imposed."

> rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill* v. *Alabama*, 310 U. S. 88, 97, 98, Cf. *Staub* v. *Baxley*, 355 U. S. 313."

The principal constitutional objection to each clause of the statute relating to communications, other than the first (which is analyzed and shown to be unconstitutional in Point I of this brief) will be outlined seriatim.

The second clause of Section 2905.34 provides:

> "No person shall knowingly sell, lend, give away . . . or have in his possession or under his control an . . . book, pamphlet, paper, magazine, *not wholly obscene* but containing lewd or lascivious articles, advertisements, photographs . . .". (emphasis supplied)

In *Roth* v. *United States* (1957), 354 U. S. 476, 489 the Court held that a work may not constitutionally be proscribed merely because isolated parts are thought obscene. The Court ruled that to so judge a work by separate parts or portions was restrictive of the freedoms of the speech and press, and held that the test in each case, if the judgment is to meet constitutional standards, must be the dominant effect of the work as whole. *Roth* v. *United States* (1957), 354 U. S. at p. 490.

Section 2905.34 provides further:

> "No person shall knowingly sell, lend, give away . . . or have in his possession or under his control an . . . drawing, representation, figure, image, cast, instrument or article of an indecent or immoral nature . . .".

It is a hornbook rule that a statute making conduct criminal must clearly define the prohibited conduct so that

those affected will know what acts are forbidden. If one cannot, by reading a statute, know what acts will offend against it, an attempt to enforce the statute violates the due process guarantee of the Fifth or Fourteenth Amendment. *Connally* v. *General Construction Co.*, (1926) 269 U. S. 385, 391; *Lanzetta* v. *New Jersey*, (1939) 306 U. S. 451, 453; *United States* v. *L. Cohen Grocery*, (1920) 255 U. S. 81; Due Process Requirements of Definiteness in Statutes, 62 Harv. L. R. 77 (1948). Such law, as Justice Jackson observed, "fails to give adequate guidance to those who would be law abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused". *Musser* v. *Utah*, (1947) 333 U. S. 95, 97.

Certainly the language of Section 2905.34 under consideration does not forewarn anyone subject to the law, of the nature or sort of drawings and representations that will be considered "immoral" within the sweep of the law, and the possession of which may subject one to imprisonment for seven years. The terms "immoral or indecent" are not descriptive of the category of articles or representations within the compass of the law; they are subjective words of disapprobation, and their meaning will vary with the person charged with enforcing the law. *Commercial Pictures Corp.* v. *Regents*, (1954) 346 U. S. 587. The application of the statute rests upon the reactions of individual officials to particular drawings or objects.

The clause under consideration has another constitutional infirmity. It punishes the making, possession or distribution of drawings and representations thought to express, or symbolize some concept contrary to the prevailing moral standards. The power of the state cannot be exercised to punish or suppress the expression of an idea

The issuance of a second-class mailing permit is not a guarantee that the holder will not thereafter enter obscene photographs or other obscene material in the mails. It is also difficult to understand why matter sent under third-class permit is not placed in the same category as material entered as second-class matter. And there is no assurance that any work said to be a work of art by "an association of artists" and made by one of its members, will not in fact be obscene. The discrimination in favor of associations of self-styled artists and persons who may receive obscene matter sent under second-class permit is completely irrational and bears no relation to the purpose of Section 2905.34. *Skinner* v. *Okla.*, (1942) 316 U. S. 535, *City of Cincinnati* v. *King*, (1960) 11 Ohio Ops. 2d 433, *Katzev* v. *Los Angeles*, (1959) 341 P. 2d 310.

The Statute is void on its face because in its application, and by its very existence, it inhibits expression

As noted in the preceding discussion, Section 2905.34 authorizes punishment of communications within the protection of the constitution. The possibilities of abuse inherent in the statute renders it void in its entirety. It is settled, as Mr. Justice Reed said in *Winters* v. *New York*, (1948) 333 U. S. 507, 509, that a statute that permits "within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment. *Stromberg* v. *People of the State of California*, (1931) 283 U. S. 359, 369; *Herndon* v. *Lowry*, (1937) 301 U. S. 242, 258". See also *Smith* v. *California*, (1959) 361 U. S. 147, 152-154; The Void for Vagueness Doctrine in the Supreme Court (1960) 109 U. of Pa. L. R. 67, 81.

Because of the broad sweep and the vagueness of the provisions discussed, the section because it exists, and may be invoked whenever government officials with authority

see fit, constitutes a threat to the exercise of the right of communication. It stands, to borrow Mr. Justice Frankfurter's phrase, as a derelict in the waters. Mr. Justice Murphy wrote in *Thornhill* v. *Alabama* (1940) 310 U. S. 88, 97-98:

> "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."

Section 2905.34 does not give fair warning of its prohibitions

Where the terms of a statute restrictive of the right of free expression are so broad and indefinite that one cannot know what it means, or predict the way it will be applied, the statute may be held void on its face without regard to its application in a particular case. The rule is founded on the fundamental principle mentioned before that one may not be punished for a crime unless he is given a reasonable opportunity to avoid committing it. One cannot from a reading of Section 2905.34 or any gloss upon it, guess what conduct is prohibited by the proscription against possessing, lending or giving an immoral article or drawing etc. Such indefiniteness is doubly objectionable in a statute regulating communication for it denies due process and abridges the freedom of the press. *Winters* v. *New York*, (1948) 333 U. S. 507, 509, 515; *United States* v. *Raines*, (1960) 362 U. S. 17, 22.

POINT II

Section 2905.34 of the Ohio Revised Code on its face abridges the freedom of the press and should be declared void in its entirety.

We are not, in the discussion of this point, concerned with the application of Section 2905.34 in this case. The objection presented here is to the evil that the law works by its existence. Generally this Court will pass upon the constitutionality of a statute only as it was applied or construed in,—and to the extent necessary to determine,—the particular case before it. But the general rule is not observed, and unconstitutional applications of the statute that are not directly involved in a case may nevertheless be considered (1) where a statute is unconstitutional in the majority of its intended applications, *United States* v. *Raines* (1960) 362 U. S. 17, 23; or (2) where the statute would in its application have an inhibitory effect on expression, *Smith* v. *California* (1959) 361 U. S. 147; *Shelton* v. *Tucker* (1960) 364 U. S. 479, 488; *Thornhill* v. *Alabama* (1940) 310 U. S. 88, 97; *Herndon* v. *Lowry* (1937) 301 U. S. 242, 264; or (3) where the statute if left standing would be incapable of giving fair warning of its prohibitions, *United States* v. *Raines* (1960) 362 U. S. 17, 24. The statute challenged here falls within each of those exceptions.

Section 2905.34 proscribes in a single sentence without syntax, the mere possession or distribution of an obscene writing or a book *obscene in part*, or a drug or "thing intended for the prevention of conception", and the showing to a minor of a newspaper "*principally* made up of criminal news, police reports or accounts of criminal deeds", and exhibiting "stories of immoral deeds, lust or crime" on

"a street or highway or in a place (building) which may be within view of a minor." Infraction of the law may be punished by imprisonment for a term of from one to seven years in the state penitentiary or by fine of $200 to $2,000, or both. The statute was re-enacted, in substantially its present form in 1953 (Ohio Laws Vol. 125) when the Ohio statutes were revised and recodified in an attempt to eliminate obsolete and inoperative laws, (Page's Ohio Revised Code Ann. Vol. I pp. xix *et seq.*) and it was re-enacted in 1955, Ohio Laws Vol. 126 pp. 575, 577.

The statute incorporates the most objectionable features of a number of other state statutes held repugnant to the Constitution. Each clause of the statute relating to communications has been held violative of the Constitutional guaranties of freedom of expression, or due process of law, or both. It is difficult to believe that the Ohio legislators and their expert advisors were ignorant of the landmark cases holding its provisions unconstitutional, when they enacted and then re-enacted Section 2905.34.

The Statute Is Unconstitutional in the Majority of Its Intended Application

Section 2905.34 is unconstitutional in so many respects, and so much of it is invalid and inoperative, that no part may be given effect. Accordingly, Appellant's conviction under the statute cannot stand. In *Smith* v. *California* (1959) 361 U. S. 147, Mr. Justice Brennan wrote for the Court:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their

challenging or flouting accepted moral standards no matter how offensive to principles of the majority. *Kingsley Corporation* v. *Regents*, (1959) 360 U. S. 684, 689.

Section 2905.34 provides further*

> "No person shall . . . sell, give away or show to a minor a book, pamphlet, magazine, newspaper, story paper or other paper devoted to the publication of criminal news, police reports or accounts of criminal deeds or pictures and stories of immoral deeds, lust or crime . . .".

The purpose of the statute obviously is the protection of youth. But the power and obligation of the state to legislate in that area must be exercised rationally and not arbitrarily, and the legislation must bear a substantial relation to that end. *Butler* v. *Michigan*, (1957) 352 U. S. 380. The prohibitions set forth above are completely unreasonable. The statute makes it criminal to show "accounts of criminal deeds" and "stories of immoral deeds". Under the plain language of the section one could be imprisoned for a period of 7 years for giving a copy of Macbeth, or the tales of Edgar Allan Poe, to a student of 17. No distinction is made in the statute between accounts of immoral deeds that are intended to inculcate moral principles, and those that pander to low tastes.

A subdivision of a New York penal statute was declared unconstitutional because of the inclusion of language almost identical with that quoted above, *Winters* v. *New York*, (1948) 333 U. S. 507.** The scope of the New York

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*Though the provisions are of doubtful validity, we are omitting the portion of the statute relating to drugs and contraceptives and are limiting our discussion to the portions governing communication and expression.

**The statute in *Winters* was also aimed at publications tending to stimulate juvenile delinquency. (1948) 333 U. S. at p. 510.

statute had, moreover, been narrowly limited by construction, to publications that "so massed their collection of pictures and stories . . . as to become vehicles for inciting violent and depraved crimes against the person." *Winters* v. *New York*, (1948) 333 U. S. at 514.

The section held unconstitutional in *Winters* punished one who ". . . sells, lends, gives away, distributes or shows . . . any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime . . .". Mr. Justice Reed, delivering the opinion of the Court in *Winters* v. *New York*, said of the statute (1948) 333 U. S. 519-20 "It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes.' Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained." *Herndon* v. *Lowry*, (1937) 301 U. S. 242, 259.

Mr. Justice Frankfurter, in his dissent in *Winters* v. *New York*, (1948) 333 U. S. 507, 520-22, noted that the majority of the Court by its decision in Winters, also struck down among other statutes, Section 13035 of the Ohio General Code, which was later reenacted as Section 2905.34 of the Ohio Revised Code.*

The final portion of Section 2905.34 provides:

> "No person shall . . . exhibit upon a street or highway or in a place which may be within the view

* Section 13035 of the Ohio General Code is reprinted in full at p. 3a of the Appendix.

of a minor, any such books, papers, magazines or pictures".

The term "such books, papers, magazines or pictures" refers to publications "devoted to" or "principally made up of criminal news, police reports, or accounts of criminal deeds or pictures and stories of immoral deeds, lust or crime". The term "place" as used in the statute includes "any building, erection or . . . any separate part or portions thereof or the ground itself", Ohio Revised Code §3767.01.

The statute makes it an offense to keep any "accounts of crime" (so that it comprehends within its range, all detective stories, such books as Dostoievsky's, Crime and Punishment, books on war crimes and tabloid newspapers featuring reports of crimes) on view at any newsstand that minors occasionally pass. The same prohibitions apply to bookstores, the interior of which, may be observed by children, from the street or from the corridors inside a building. That part of the statute was enacted, presumably for the protection of children, but it enjoins the keeping of such material for sale to adults in places that can be seen by minors. As Mr. Justice Frankfurter said of a similar provision in *Butler* v. *Michigan*, (1957) 352 U. S. 380, 383: "Surely, this is to burn the house to roast the pig". The Court in *Butler* v. *Michigan* said in reversing a conviction under the statute (352 U. S. at 383):

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable

conditions for the maintenance and progress of a free society."

In considering the validity of Section 2905.34 of the Ohio Revised Code on its face, it must be read together with the related Sections 3767.01(c) and 2905.37 of the Ohio Revised Code, which exempt from the prohibitions of Section 2905.34 material *entered* as second class matter in the post office* and works of art *made* and distributed by artists belonging to a non-profit association of artists or by an association (not limited to artists) for the advancement of art. Under the statutory definition paintings by Michelangelo, Picasso, Matisse or Braque are not bona fide works of art because not made by an artist belonging to an association, and one could be prosecuted for possessing or selling them if they were considered obscene.** The constitutionality of Section 2905.34 must be measured as thus modified. *Davis* v. *Wallace*, (1921) 257 U. S. 478 and *Frost* v. *Corp. Commission*, (1928) 278 U. S. 515, 526 in which the Court said, "Where the excepting provision is found unconstitutional the substantive provisions which it qualifies cannot stand." So considered, Section 2905.34 is patently arbitrary and unreasonable and contravenes the equal protection clause of the Fourteenth Amendment.

* Sections 3767.01 (c) and 2905.37 App. pp. 1a, 2a.

** Although that seems to be stretching the probabilities, prints made from Michelangelo's Last Judgment, in the Sistine Chapel were in fact confiscated as obscene by customs authorities, because the genitals of some of the figures were discernible. Paul and Schwartz, Obscenity in the Mails (1957) 106 U. of Pa. L. R. 214, 218. Reproduction of nudes painted by Picasso and others by Matisse were held obscene and therefore non-mailable by the post-office, Paul and Schwartz, Federal Censorship: Obscenity in the Mail, Crowell-Collier (1961) p. 71. The Customs Bureau refused to classify collages (including those made by Braque and Picasso) as bona fide works of art until 1958, Derenberg and Baum, Congress Rehabilitates Modern Art (1959) 34 N. Y. U. L. R. 1228, 1235, 1248.

POINT III

Appellant was convicted of possessing and exhibiting the film "The Lovers", which is not obscene, according to constitutional standards. The judgment of conviction was, therefore, in violation of the First and Fourteenth Amendments.

The Court below found that though the film "The Lovers" was not "hard-core pornography", it was, the Court said commercially exploited "filth", and it added that the exhibitor by showing it, evidenced so little responsibility that he had "no right to assert constitutional guaranties which require a high degree of responsibility from those who seek their protection". (R. 517; 173 Ohio St. at 258). It is not necessary to comment on the dictum that one must exercise a high degree of responsibility before invoking a constitutional right. It is clear also that seeking economic gain from the sale or distribution of a communication, does not affect one's right to the protection of the Constitution, or the question of whether the communication is obscene. *Burstyn* v. *Wilson* (1952), 343 U. S. 495, 501-502.

The standards for determining whether a work is obscene are set out in *Roth* v. *United States*, (1957) 354 U. S. 476 and *Manual Enterprises* v. *Day*, (1962) 370 U. S. 478. If a film is suppressed as obscene and it does not fall within the definition of that term as outlined in those cases, the First Amendment right of communication is violated. *Smith* v. *California*, (1959) 361 U. S. 147, 152; *Burstyn* v. *Wilson*, (1952) 343 U. S. 495. This Court indicated in *Roth* and in later cases, its intent to limit the material that may constitutionally be suppressed as obscene, to hard-core pornography i.e. "obnoxiously debasing portrayal of sex",—material that taken as a whole appeals to "prurient interest", *and* that is "patently offensive" to current standards

of decency. *Manual Enterprises* v. *Day* (1962), 370 U. S. 478, 483, 486; *Roth* v. *United States* (1957) 354 U. S. 476, at 485; *One, Inc.* v. *Oleson,* (1958) 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield,* (1958) 355 U. S. 372; *Times Film Corp.* v. *City of Chicago,* (1958) 355 U. S. 35; *People* v. *Richmond County News* (1961) 9 N. Y. 2d 578, 586, 589; Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 32-35 (1960); Lockhart and McClure, Obscenity Censorship: The Constitutional Issue—What is Obscene, 7 Utah L. Rev. 289, 295 (1961). The Court below conceded, and it will be evident upon viewing the film, that "The Lovers" is not, and it cannot fairly be described as, "hard-core pornography".

The Courts below, although they referred to and recited the criteria outlined in *Roth* v. *United States* (1957) 354 U. S. 476, for judging whether a work is obscene, failed to apply them in this case.

The dominant theme of the film, considered as a whole, does not appeal to prurient interest (See *Roth* v. *United States* 354 U. S. at 489)

Under the rule laid down in *Roth* a work may no longer be judged by the effect of isolated portions. It must be judged as a whole. *Manual Enterprises* v. *Day* (1962) 370 U. S. at p. 487; *Grove Press, Inc.* v. *Christenberry* (1960) 276 F. 2d 433, 437 (2nd Cir.). The so-called "Hicklin test" rule,—under which a work may be judged by the effect of an isolated excerpt—was specifically rejected in *Roth* (354 U. S. at p. 489) and the Court approved instead the following charge of the Trial Court to the Jury: *"The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion."*

The Court below judged "The Lovers" by the effect of an isolated portion lasting three of the ninety minutes of the film's running time (R. 517; 173 Ohio St. at p. 28). The Ohio Court found the other eighty-seven minutes of the film deadly-dull (R. 517; 173 Ohio St. at 28). It would appear then that the film was judged on the basis of the isolated sequence objected to, and the effect of the entire film, according to the Ohio Court, was to induce boredom, not lustful desire.

The Film was not judged in accordance with "contemporary community standards." (See *Roth* v. *United States* 354 U. S. at 489)

The prosecution in this case used as the norm, in judging current attitudes, the supposed standards of the people in Cuyahoga County (the geographical limits of the Court's jurisdiction) (R. 61, 73, 154, 156, 179, 180, 181, 236, 259, 268, 291, 323, 367, 433, 485-6.) The Trial Judges declared that in finding that "The Lovers" appeals to prurient interest they were "applying community standards" (R. 501) but they did not indicate the community to which they referred. However, the only evidence in the record that could support a finding of violation of community standards related to the County standards. The evidence admitted with respect to national standards showed that the film was not objectionable or obscene when judged in accordance with the contemporary standards of the people of the nation. (R. 327-8, 468-9, Dft. Ex. K; R. 496, 1334; Dft. Ex. G-a-1, Review in Newsweek Magazine; R. 489, 1330; Dft. Ex. H-1; R. 491, 1331; Dft. Ex. I; R. 493, 1332.) We do not believe that the standards of the particular county in which a dealer in books or films is tried, can constitutionally serve as a guide.

The term "community" is not defined in the opinion of the Court in *Roth*, but it is clear that this Court did not

intend the judgment of material by the singular standards of the people of a city, township or county. The requirement of conformity to the differing standards of each city, county and each rural area of a state would impose an insuperable burden on the distribution or dissemination of communications. *Manual Enterprises* v. *Day* (1962) 370 U. S. 478, at 488.

To the extent that they can be determined or shown (by evidence, for example, of the acceptance of a particular work in other parts of the country) the standards of the nation rather than those of a particular state, should serve as a guide,—even in prosecutions under state law. The traffic in books, magazines and films, in the United States is of necessity nation-wide. Different versions of books or of films cannot be prepared for distribution in different states, and a work designed to conform to the various standards of *all* areas would not be worth distributing. There is no great danger of moral degradation, and no great sacrifice of state sovereignty in acceptance of the nation's standards as the norm. That would not result in greater restriction, for each State is, of course, free to permit greater latitude within its boundaries.

The following comment on §207.10, the model penal statute punishing those who deal in obscene material, in the sixth draft of the ALI Model Penal Code, is instructive in that connection:

> ". . . a book could hardly be obscene in one county of a state if it appeared openly on public library shelves and in book stores throughout the state. And a tribunal in one state is entitled to know that a moving picture or book has circulated elsewhere in the United States, that it has been reviewed in responsible journals there, and, perhaps, that it has been adjudicated to be or not to be obscene. Furthermore, since

> a large part of the responsibility in the area has been assumed by the national government enforcing federal obscenity legislation, a country wide approach is almost unavoidable." A. L. I. Model Penal Code, Tent. Draft No. 6 (1957) p. 44.

Whether the issue of obscenity is to be judged by the mores of the state or the nation, we do not believe that "a lesser geographical framework for judging this issue" may, as it did in this case, constitutionally serve as the standard. *Manual Enterprises* v. *Day* (1962) 370 U. S. at p. 488. Judged by the standards of the people of the United States, or of the people of the State of Ohio, "The Lovers" is not obscene. The film was shown publicly in Toledo and Columbus, Ohio, (R. 326-7, 330) and there was no prosecution of, or interference with, the exhibition in those cities. The film was also shown in major cities in other states throughout the United States (R. 361), and such few attempts as were made to interfere with it were defeated. The United States Customs Bureau (presumably applying the standards of the nation) judged the picture "not obscene" (Dft. Ex. K; R. 496, 1334).

The Exhibition of the Picture "The Lovers" may not be punished as obscene because of its redeeming social importance

The Court in *Roth* v. *United States* (1957) 354 U. S. 476 at 485, limited the application of the term "obscene" so that it may not be held to include works that have social value or express ideas of social import (including "unorthodox ideas" and "ideas hateful to the prevailing climate of opinion"). It is clear that the Court intended to liberate all serious art from the shadow of the censor. Kalven, Metaphysics of The Law of Obscenity, in The Supreme Court Review 11-13 (Univ. of Chicago Press, 1960).

The Court below did not take into consideration the artistic merit of the film. The excellence of the direction, acting and photography of "The Lovers" have been generally acknowledged by those qualified to make such judgments (R. 469). A work of such social value may not be banned as obscene, *Roth* v. *United States* (1957) 354 U. S. at 484, 487.

The question of whether the attacked expression is suppressible within Constitutional standards is ultimately one for this Court. *Roth* v. *United States* (1957) 354 U. S. 476, 479, 497. We believe that a viewing of the film will convince the Court that the picture may not be considered obscene under any constitutionally permissible test.

POINT IV

Section 2905.34 of the Ohio Revised Code infringes the right of communication protected by the First and Fourteenth Amendments and is void for vagueness under the Due Process Clause of the Fourteenth Amendment in making it a felony to possess or exhibit an "obscene" motion picture.

The prevailing opinion in this Court, as expressed in *Roth* v. *United States*, 354 U. S. 476, is that a criminal prohibition against "obscenity" does not violate the right of communication and that the word "obscene" as used in a criminal statute is not unconstitutionally vague. The record in this case furnishes occasion for reconsideration of those rulings. See *Smith* v. *California*, 361 U. S. 147, 155, 167 (concurring opinions of Mr. Justice Black and Mr. Justice Douglas).

Conclusion.

The order appealed from should be reversed, for

1. Section 2905.34 of the Ohio Revised Code is and should be declared void in its entirety, for each of its provisions imposes a restraint upon communications prohibited by the First and Fourteenth Amendments.

2. Section 2905.34 is and should be declared void in its entirety because it infringes the right of communication in punishing the showing of obscene matter, and is void for vagueness.

3. Section 2905.34 of the Revised Code is and should be declared void as interpreted and applied in this case in that it provided for the punishment of the mere possession of an obscene film, and the exhibition of an obscene film, without regard to the question of wrongful intent.

4. The film "The Lovers" is not obscene, judged in accordance with constitutional standards, and the conviction of Appellant was, therefore, in violation of the First and Fourteenth Amendments.

5. The Appellant was convicted and his conviction was affirmed without due process of law.

February 5, 1963

Respectfully submitted,

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On the brief

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APPENDIX.

Ohio Revised Code Section 2905.342. *"Exhibition of obscene movies prohibited; movies inciting disorder or violation of laws prohibited:*

"No person shall produce, sell, lease, lend, give away, or distribute for the purpose of exhibition, or exhibit, or have in his possession or under his immediate control for any purpose:

"(A) An obscene motion picture film; or

"(B) Any motion picture film, the exhibition of which has created a public disorder, or from the exhibition of which a public disorder is imminent.

"The exhibition of a motion picture film which teaches or advocates that the violation of any of the criminal laws of the state of Ohio or any of the criminal laws of the United States of America is a proper or desirable course of conduct shall, prima facie, be deemed to create an imminent public disorder for the purpose of initiating the arrest of any person for the violation of this section.

"Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned not more than six months, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1962 Supplement, at p. 10.)

Ohio Revised Code Section 2905.37. *"Legitimate publications not obscene:*

"Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article

is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, at pp. 63-64.)

Ohio Revised Code Section 3767.01 (in effect at the time of Appellant's conviction). "*Definitions:*.

"As used in all sections of the Revised Code relating to nuisances:

" 'Place' includes any building, erection, or place of any separate part or portion thereof or the ground itself;

"(B) 'Person' includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

"(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition, films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This section and sections 2905.34, 2905.35, 2905.37, and 2933.21 of the Revised Code shall not affect any motion picture film which has been approved by the division of film censorship or any newspaper, magazine, or other publication entered as second class matter by the post-office department."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Titles 37, 39, at p. 201.)

Ohio General Code Section 13035. *"Disposing of, exhibiting, advertising, etc., obscene literature or drugs for criminal purposes."*

Whoever sells, lends, gives away or exhibits, or offers to sell, lend, give away or exhibit, or publishes or offers to publish or has in his possession for such purpose, an obscene, lewd or lascivious book, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, drawing, representation, figure image, cast, instrument or article of an indecent or immoral nature, or a drug, medicine, article or thing intended for the prevention of conception or for causing an abortion, or advertises any of them for sale, or writes, prints, or causes to be written or printed, a card, book, pamphlet, advertisement or notice giving information when, where, how, of whom or by what means any of such articles or things can be purchased or obtained, or manufactures, draws, prints or makes such article or thing, or sells, gives away or shows to a minor, a book, pamphlet, magazine, newspaper, story paper or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, of pictures and stories of immoral deeds, lust or crime, or exhibits upon a street or highway or in a place which may be within the view of a minor, any of such books, papers or pictures, shall be fined not less than fifty dollars nor more than two thousand dollars or imprisoned not more than five years, or both (R. S. Sec. 7027).